After considering all the facts I find that there is no serious question to be tried.

I will also consider the balance of convenience in the event that I am held to be wrong in finding that there is no serious question to be tried.

In this case I find that if the plaintiffs succeed in the action they will be adequately compensated by damages for the loss sustained. The two defendants or either of them will be able to comply with any order as to damages.

I therefore dismiss the application with costs.

Application dismissed.

Solicitors: *Sri Ram, Zulkifly & Kumar*; *Khana & Co.*

Reported by *Ng Sheau Jiuan*

Seok Mee Seong v Abdul Wahab bin Abdul Rahman

HIGH COURT (SEREMBAN) – CIVIL REVISION NO 13-10 OF 1988
MUSTAPHA HUSSAIN J
19 SEPTEMBER 1988

Civil Procedure – Default judgment – Setting aside of – Claim for cost of repairs to damaged car – Whether they were within meaning of 'debt or liquidated damages' – Final judgment given by magistrate and not interlocutory – Whether judgment irregular

Civil Procedure – Absence of defendant on day of hearing – Whether explanation as to absence the deciding factor in setting aside default judgment – Whether defence on the merits and triable issues disclosed the more crucial factor

The respondent's car was involved in a road accident with the applicant's car. The respondent's car was subsequently repaired and he filed a claim in the Magistrate's Court. The applicant's solicitors were advised to file a defence but on the day of the hearing, the applicant and his solicitor were absent and there was no defence filed. The learned magistrate therefore gave judgment in default of defence against the applicant. The applicant then applied to the court to set aside the judgment in default and for leave to enter appearance and to defend the case. The learned magistrate, after hearing the application to set aside the judgment, dismissed it and awarded costs to the respondent. The applicant then applied to the High Court for a revision order, contending that (i) the default judgment was irregular as the respondent's claim was not a debt or a liquidated sum. As such, the default judgment should be interlocutory and not final; (ii) even if the judgment was regular, there was a defence on the merits.

Held, allowing the application:

(1) The words 'debt or liquidated demand' do not extend to unliquidated damages even if that amount of damages is a definite figure. In this case, even though the plaintiff's claim for cost of repairs to the damaged car have been quantified and a definite figure given, it does not come within the meaning of 'debt or liquidated damages'.

(2) In an application to set aside a judgment in default, the explanation as to why the defendant or his counsel was absent is relevant but not the deciding factor. What is important or crucial is whether there is a defence on the merits. The draft defence enclosed with the application disclosed triable issues and the learned magistrate should have allowed the application to set aside and leave given to the applicant to defend the action subject to the applicant paying costs.

Cases referred to

1 *Mahindar Singh* v *Amanah Saham Pahang Bhd & Anor* [1984] 1 CLJ 181 (folld)
2 *Knight* v *Abbott* (1882) 10 QBD 11 (folld)
3 *Seng Huat Hang Sdn Bhd* v *Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348 (folld)
4 *Evans* v *Bartlam* [1937] AC 473 (refd)

VT Singam for the applicant.
Respondent in person.

Cur Adv Vult

Mustapha Hussain J: The respondent is the owner of car No WG 2957 which was involved in a road accident with the applicant's Mercedes car No CA 2497 at about 3.20 pm on 26 May 1987 near the Balai Bomba in Rembau. According to the respondent's police report (No 1038/87, Balai Polis Pedas) the applicant's car knocked into his car from the back.

The applicant too made a report (No 1039/87, Balai Polis Pedas) saying that the respondent driving in front of him suddenly applied brakes and the applicant had no time to stop his car as at that time he was cleaning the windscreen. It was raining at that time.

A letter dated 28 September 1987 from the OCPD Tampin confirmed that the applicant was summoned under r 10 of LN 166 of 1959 and was compound fined $75.

The respondent obtained an estimate of repairs to repair his damaged car from RT Lingam Insuran Adjusters (M) Sdn Bhd who estimated the cost of repairs of the car at $1,727.71 and the adjuster's bill amounted to $142.50 (a breakdown of the damages and estimated cost of repairs together with the adjuster's bill can be found in the adjuster's report dated 20 August 1987, annexed to the respondent's affidavit dated 21 March 1988 (encl 20)). The respondent's car was subsequently repaired at a cost of $2,471.20 (see invoice issued by Syarikat Wee Seng Motor, also annexed to affidavit encl 20).

On 2 September 1987 the respondent filed a Small Claim Court Summons No 06-1-87 in Second Class Magistrate's Court, Rembau. His claim was:

Statement of claim
Ganti rugi kereta WG 2957 kerana kemalangan jalan raya disebabkan kelalaian pemandu.

Prayers

(1)	Kerusakan kereta WG 2957	$1,727.71
(2)	Bayaran adjuster	142.50
(3)	Roncit dan setem	50.00
	Jumlah	$1,920.21

The order to the defendant, ie to the applicant here, was dated 2 September 1987 and he was informed that if the applicant disputed the claim he must file a statement of defence within two weeks from the date of receipt of the order. And in that order (in fact it is a notice) the date of hearing was stated to be 1hb Oktober 1987. But the date of hearing at the end of the order, the date '1' had been written over to read '8'. Presumably the actual date of hearing was 8 October 1987.

The order to the defendant, ie the applicant here, was sent by AR registered post and M/s Lawrence, Dhillon & Associates wrote a letter dated 7 October 1987 to the Magistrate's Court, Rembau, which was received by the court on 8 October 1987, the date of hearing of the case, asking the case to be transferred to the First Class Magistrate's Court as they wished to represent the defendant (the applicant here). No formal application is necessary to apply for the transfer. Accordingly a new date of hearing was fixed on 12 November 1987 for mention and also for the applicant here to enter his appearance and defence – see letter dated 8 October 1987 from the court whereby the applicant's solicitors were also informed that the case had been transferred to First Class Magistrate's Court and re-numbered (R)G Sibil No 89-29-87.

On 20 October 1987, the applicant's solicitors wrote to the court (the letter was received by the court on 24 October 1987) asking the court to direct the plaintiff (the respondent here) to file a summons and statement of claim so that the applicant's solicitors could file the defence.

The court by letter dated 2 November 1987 informed the applicant's solicitors that the statement of claim (using Borang 164A under the Small Claims Court) had been served on the applicant and there was no necessity to file a fresh summons and statement of claim as this was a Small Claims Court case being transferred to the First Class Magistrate's Court. By the same letter the applicant's solicitors were advised to file the applicant's defence before 12 November 1987, the date fixed for mention of the case.

On 12 November 1987, the date for mention, the plaintiff (respondent here) was present. The defendant (applicant here) was absent and his solicitor was also absent. Also there was no defence filed. The learned magistrate therefore gave judgment in default of defence in the sum of $1,910.21 and costs of $20.

By letter dated 20 November 1987 (which was received by the court on 2 December 1987) the applicant's solicitors applied to the court to set aside the judgment in default and for leave to enter appearance and to defend the case. The application was fixed for hearing on 28 January 1988. As the application had not been served on the plaintiff (respondent) the hearing was adjourned to 3 March 1988 when the plaintiff (respondent) asked for time as he was just served with the application. It was then adjourned to 7 April 1988.

On 7 April 1988 the learned magistrate after hearing the application to set aside the judgment dismissed it and awarded costs of $20 to the plaintiff (respondent).

The solicitors for the applicant (defendant in the court below) have now applied to this court for revision. Two points were raised before this court which were also raised before the learned magistrate at the hearing of the application to set aside. These are:

(1) as the claim is not a debt or liquidated sum, the judgment given by the learned magistrate should be an interlocutory judgment and not a final judgment. The final judgment in this case is therefore irregular;
(2) even if the judgment is regular, there is a defence on the merits as disclosed in the draft defence filed and leave to defend should be granted subject to costs.

VC George J in his judgment in the case of *Mahindar Singh* v *Amanah Saham Pahang Bhd & Anor*,[1] a case on all fours with ours, succinctly reasoned and held that the words 'debt or liquidated demand' do not extend to unliquidated damages even if that amount of damages is a definite figure. This court is of the same view.

In our case the respondent's (plaintiff) claim is for costs of repairs to his damaged car. There are 15 items of repairs (see invoice of Syarikat Wee Seng Motor). Were all these items of repairs and or replacement of parts necessary or were the replacement of parts and repairs carried out as a result of the accident? Even though the claim here has been quantified and definite figures given, it does not come within the meaning of 'debt or liquidated damages' (see *Knight* v *Abbott*[2]).

In an application to set aside a judgment in default, the explanation as to why the defendant or his counsel was absent is relevant but not the deciding factor. What is important or crucial (as Edgar Joseph Jr J said in *Seng Huat Hang Sdn Bhd* v *Chee Seng & Co Sdn Bhd*[3]) is whether there is a defence on the merits. The draft defence enclosed with the application discloses triable issues within the meaning of *Evans* v *Bartlam*.[4] The learned magistrate should have allowed the application to set aside and leave given to the applicant to defend the action subject to the applicant paying costs.

The judgment in default ordered by the learned magistrate here is therefore set aside and the applicant given seven days from today to file his appearance and defence.

As regards costs, the applicant here must bear the costs. The applicant is ordered to pay $300 to the respondent (plaintiff) being costs occasioned by him not being present on the day the judgment was entered and to pay the same within seven days from today.

Application allowed.

Solicitors: *Daim & Gamany.*

Reported by *Ng Sheau Jiuan*

Eu Finance Bhd v Siland Sdn Bhd (M & J Frozen Food Sdn Bhd, Intervener)

HIGH COURT (JOHOR BAHRU) – ORIGINATING SUMMONS NO 180 OF 1985
LC VOHRAH J
22 SEPTEMBER 1988

Land Law – Private caveat – Foreclosure proceedings against chargor's land – Auction sale of land – Land sold to intervener – Caveat lodged by registered owner against own land – Removal of caveat – Whether registered owner can maintain caveat – Whether intervener breached contract of sale – National Land Code 1965, s 323

Eu Finance Bhd ('Eu Finance') is a licensed finance company and became the registered chargee of the defendant's land ('the said land') as a result of a loan granted to Siland Sdn Bhd ('Siland'). Siland defaulted in its payments in respect of the loan and Eu Finance applied to the court for an order for sale which was granted. The said land was sold by way of a public auction on 25 January 1987 to the intervener ('M & J') for $196,000. A sum of $49,000, being 25% of the purchase price, was paid as deposit. The memorandum of contract stipulated that the balance of the purchase price in the sum of $147,000 had to be paid within 30 days of the date of the sale, ie on or before 24 February 1987, whereupon M & J would have been entitled to a registrable certificate of sale to be issued by the senior assistant registrar. On 18 February 1987, the solicitors for M & J wrote to the senior assistant registrar of the High Court asking for an extension of time for a period of two months from 25 February 1987 to pay the balance. The senior assistant registrar received this letter on 21 February 1987 but gave no reply. On 9 April 1987, Siland lodged a private caveat in respect of the said land. On 9 May 1987, Eu Finance applied for the removal of the caveat and on 8 July 1987 the application was struck out. On 30 August 1987 Siland and the auctioneer brought a civil suit against M & J for, inter alia, rescission of the memorandum of contract and for forfeiture of the deposit paid by M & J. On 15 July 1987, M & J filed an application praying for an extension of time to complete the purchase and an order was granted extending the time for completion by a period of 14 days from that date. On 21 February 1988, the order granting the extension of time was set aside. M & J has since paid the balance of the purchase price into court. M & J was willing and able to complete the purchase but is prevented from doing so by the existence of the caveat lodged by Siland. This is therefore an application by Eu Finance for the removal of the caveat. The only issue for determination is whether Siland has a caveatable interest under s 323 of the National Land Code to enter the caveat. Counsel for the defendant concedes, inter alia, that since M & J has not observed the condition of sale with regard to the payment of the balance of the purchase price, Siland remains the owner of the said land and argues that by virtue of that status alone it acquires the right to enter and maintain the caveat because of the words in the first limb of s 323(1)(a).

Held, allowing the application to remove the caveat:

(1) Siland could not successfully bring itself within the first limb of s 323 in the light of its plain meaning. A person who relies on his status as registered owner must necessarily be a person already possessing title or interest in the land and not merely a person claiming title to or any interest in that land, and must as a matter of logic be excluded by the language of s 323(1), for he is not 'claiming' title to the land: title is already his.

(2) As Siland has founded its right to caveat solely on its status as the registered owner of the said land, Siland merely as registered owner was not entitled to caveat its own interest. An order in terms of the application was granted in that the caveat lodged by Siland be removed forthwith by the Registrar of Titles.

Case referred to
1 *Re An Application by Haupiri Courts Limited (No 2)* [1969] NZLR 353 (folld)

Legislation referred to
National Land Code 1965 ss 256, 323(1)(a)
Land Transfer Act 1952 [NZ] s 137

Kenny Ng for the plaintiff/applicant.
S Gunasegaran for the defendant/respondent.
Arthur Lee (*SC Yap* with him) for the intervener.

Cur Adv Vult

LC Vohrah J: This is an application on the part of Eu Finance Bhd ('Eu Finance') for the removal of a caveat which has been lodged by Siland Sdn Bhd ('Siland') against a piece of land held under HS(D) 40269 Lot PTD 18279 in the Mukim of Plentong, Johor Bahru ('the said land') of which Siland is the registered owner.

The facts forming the background of this application are as follows. Eu Finance is a licensed finance company and became the registered chargee of the said land as a result of a loan granted to Siland. Siland defaulted in its payments in respect of the loan and Eu Finance accordingly on 14 April 1985 applied to the court by Originating Summons No 180 of 1985 under s 256 of the National Land Code for an order for sale which was granted on 18 November 1986. The said land was put up for public auction on 25 January 1987 with a reserve price of $180,000. In the event the said land was sold to one Krishnan Moorthy who was acting for M & J Frozen Food Sdn Bhd ('M & J') for $196,000 and a sum of $49,000 being 25% of the purchase price was paid as